Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1645

MARION DAVIS,
Petitioner,

vs.

MARATHON OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals For the Sixth Circuit

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MARION DAVIS,
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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals entered in this matter is reported at 528 F.2d 395 and appears in the Appendix at p. A3. The order denying petition for rehearing appears at p. A1. The opinion of the District Court entered October 25, 1972, is reported at 35 Ohio Misc. 73 and is printed in the Appendix at p. A34 to this petition. The opinion of the District Court entered September 17, 1974 is not yet reported and appears in the Appendix at p. A22 to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the court of appeals err in denying a new trial where the proceedings as a whole in the district court had, in effect, though not in form, denied Petitioner a trial by jury in a private antitrust case in which the trial court, prior to trial, expressed its view that a jury trial was inappropriate, although required, had, during trial, summarily excluded Petitioner's lately discovered material witnesses without permitting Petitioner to show by evidence or authority that imposition of sanctions was not only undeserved and unwarranted but also unreasonably oppressive and prejudicial to Petitioner, and had, more than eleven months after trial, after drawing conclusions of fact from conflicting proofs of the parties, entered judgment for Respondent notwithstanding the jury's verdict awarding damages to Petitioner?

2. Must a lessee service station dealer plaintiff in a private antitrust case wherein he claims damages from enforcement of a covert tying arrangement prove by testimony of other lessee-dealers a general plan of defendant to enforce its tying arrangement where his own testimony is corroborated by an eyewitness to veiled threats to him for non-compliance with the tying arrangement and where cancellation of his lease is prompted at least in part by his failure to buy more TBA in compliance with the tying arrangement enforced by an oil company Respondent whose relatively large size in its marketing area is shown and whose former management employee testified that

Respondent was entitled to the profits from TBA (tied product) because of its investment in the land and buildings it leased to its dealers (tying product).

CONSTITUTION AND STATUTES INVOLVED

This case presented questions arising under United States Constitution Amendment VII, and under 15 U.S.C. §1 (Section 1 of the Sherman Act) and 15 U.S.C. §14 (Section 3 of the Clayton Act) which are set forth in the Appendix at p. A38.

STATEMENT OF THE CASE

Marion E. Davis, a former Marathon Oil Company lessee-dealer service station operator, filed this action against Marathon Oil Company, seeking treble damages for non-renewal of his service-station lease claiming Marathon's violation of 15 U.S.C. §1 (Section 1 of the Sherman Act), and of 15 U.S.C. §14 (Section 3 of the Clayton Act). As a basis for relief, Davis alleged a covert tying arrangement enforced by Marathon, whereby Marathon (vendor) would sell its gasoline and lease its service stations (the tying products) only on condition that the buyer (lessee-dealer) also purchase Marathon-sponsored tires, batteries and accessories (the tied product). This allegation was denied by Marathon. Trial was had from September 24, 1973, through October 4, 1973. During trial, upon motion of Marathon, the trial court excluded the testimony of five of Davis' witnesses. At the close of Petitioner's case, and again upon renewal at the conclusion of Marathon's evidence in defense and Davis' rebuttal evidence, the trial court overruled Marathon's motion for a directed verdict against Davis and the case was submitted to the jury under proper instructions. The

jury returned its general verdict in favor of Davis on his claims. Judgment was entered on the verdict December 11, 1973. Thereafter, on December 19, 1973, Marathon served its motion in the alternative for judgment notwithstanding the verdict or for a new trial, contending that the evidence upon trial failed to establish Davis' claim, or, alternatively, that the jury had insufficient evidence from which to make its findings. On September 17, 1974, nearly a year after the jury's verdict, the trial court entered its order and opinion granting Marathon's motion for judgment notwithstanding the verdict, vacating the judgment on the verdict entered December 11, 1973, entering judgment notwithstanding the verdict of the jury in favor of Marathon and against Davis, and dismissing the action at Davis' cost. Judgment was entered the same day. An appeal to the United States Court of Appeals for the Sixth Circuit was timely perfected, pursuant to 28 U.S.C. §1291. The Court of Appeals affirmed the judgment of the District Court by its order entered December 12, 1975, and thereafter denied Davis' petition for rehearing by its order entered February 12, 1976. A brief history follows:

1. At a pretrial conference in this private antitrust treble damage action, the trial judge, *sua sponte*, raised the question of Davis' right to a trial by jury, granting Davis leave to file a brief in support of his written jury demand. After considering briefs of counsel for both Davis and Marathon, the trial judge reluctantly "sustained" Davis' jury demand and entered his written opinion explaining therein his belief that jury trials are inappropriate in antitrust cases.

2. One week before trial, Davis' attorneys learned that Marathon had been sued by a lessee-dealer some time previously in a suit then pending in the United States

District Court in Columbus, Ohio, a different judicial district, in a case raising similar issues. Investigation revealed that the plaintiff therein and one of his key witnesses were lessee-dealers who would be unafraid to testify in Davis' behalf respecting the existence and enforcement of the tying arrangements claimed by Davis. The names and the nature of the enforcement activities of their Marathon sales representatives were also learned, together with the information that such Marathon agents were directly subordinate to the Marathon district manager who was to be Marathon's corporate representative at Davis' trial. These sales representatives were thought to possess relevant documentary evidence tending to prove Davis' claims. Within forty-eight hours thereafter, written supplemental answers to interrogatories were served upon Marathon trial counsel, setting forth in full the names, addresses and substance of these witnesses' expected testimony and other evidence. At trial, Marathon moved to exclude the testimony of the witnesses as a sanction for late discovery, which motion the trial court granted in spite of the attempted explanation by Davis' counsel and without consideration of the relative potential harm to be suffered by the parties.

3. Some of the material facts adduced at trial are that, from the spring of 1961 until August, 1966, Marion Davis was the lessee-operator of service stations in Findlay, Ohio, under leases with Pure Oil Company. In the course of running these businesses, Davis provided a truck and trailer rental service, engaged in motor tune-up, brake repair, vehicle washing, and muffler and tail pipe replacement. Davis sold tires, batteries and replacement automobile and truck parts as required to supply the needs of his customers. One of these customers was a forty-five car and truck fleet of the Ohio Bell Telephone Company office located in Findlay. Davis performed

such repair work for this customer as he was requested by it to do, and which he was able to perform at his Pure Oil Station.

4. During July, 1966, Marathon representatives interviewed Davis at his Pure Oil station and at his home and solicited him to assume operation of College Marathon service station, also in Findlay, Ohio. Prior to execution by Davis of the Marathon service station lease, certain proposed points of agreement were written at the direction of the Marathon district manager, by the terms of which, among others, Davis agreed to purchase from Marathon the existing inventory of the former lessee, and was assured that his qualified Pure Oil customers would be issued Marathon credit cards. The hours of operation of the service station were fixed by this letter agreement, Davis agreed to utilize Marathon's recommended bookkeeping service, and to participate in all Marathon-sponsored advertising programs. The letter designated the Marathon sales representative to be responsible for this operation and to handle all matters and dealings between Davis and Marathon. Davis was verbally assured that he could continue to operate his truck and trailer leasing business and to service his fleet customers.

5. During the years 1966 through 1970, Marathon marketed its brand of products and its sponsored brands in the states of Wisconsin, Michigan, Illinois, Ohio, Kentucky and Florida, among others. The Marathon Ohio region, a marketing unit, encompassed the entire State of Ohio, a portion of Kentucky and a stretch of Interstate Highway I-75 down through Florida. In the State of Ohio, Marathon, with over one thousand service stations, ranked second or third in sales of branded gasoline during the year 1970. Ninety percent of Marathon's service stations were lessee-operated. From mid-1966 through mid-1970,

Marathon pursued a program of selling at wholesale to its dealers selected brands of tires, batteries and accessories referred to as TBA. Ninety percent of these TBA sales were accomplished by Marathon sales representatives referring their orders from dealers to Marathon's authorized B. F. Goodrich or Firestone Tire and Rubber Company suppliers for delivery. Marathon sold both B. F. Goodrich and Firestone brand tires. A dealer could choose to stock either one of these two brands. Marathon supplied Delco brand automobile batteries. The term "accessories" as applied to Marathon's program applied to a limited number of kinds of replacement parts, including, principally, Fram brand oil and air filters, Anco brand windshield wiper blades, Champion brand spark plugs, B. F. Goodrich or Firestone fanbelts and radiator hoses, together with shock absorbers, sealed beam headlights, automobile lamp bulbs, antifreeze, polishes, auto chemicals and the like. These are the fast-moving multi-application replacement parts ordinarily stocked and sold by service station dealers.

6. Non-oil company automobile parts suppliers stock and supply to service stations many more replacement parts slower moving than these, not ordinarily stocked by service station dealers, such as mufflers and tail pipes, water pumps, generators, alternators, regulators, gaskets, wheel bearings, hydraulic parts, brake shoes and ignition parts, although some service station dealers stock supplies of ignition parts. Marathon did not offer these slow-moving items for sale as part of its TBA program.

7. Marathon promoted its TBA program to present to the public a consistent image in its leased stations. The former Ohio Region sales manager testified on direct examination that TBA sales were "frosting on the cake" to which Marathon was entitled because of its investment in the land and buildings leased to dealers.

8. On October 11, 1966, Davis bought an order of fifteen Delco Brand batteries from an independent jobber. On October 14, 1966, Davis requested that jobber to accept return of the order, saying that his Marathon representative had told him to return them immediately. The jobber accepted the return. On October 17, 1966, an identical order of fifteen Delco brand batteries was shipped to Davis by B. F. Goodrich upon order by James Day, and was billed to Davis by Marathon. Thereafter, Davis' orders for Marathon TBA were prepared by his Marathon representatives until February, 1970, when Davis returned a large quantity of accessories delivered by B. F. Goodrich Company. The sales representative arrived later the same day to investigate the return. Although, with the consent of Marathon's sales representative, he discontinued buying radiator hoses from Marathon during 1969, after October, 1966, Davis made his large purchases of TBA for stocking purposes, only from Marathon until March 5, 1970, when he purchased, from an independent jobber, $752.00 worth of shock absorbers for stock, and March 12, 1970, when he bought for shelf stock twelve non-Marathon sponsored tires from an independent tire distributor. Within the hearing of Davis' employee, which employee so testified at trial, the Marathon sales representative told Davis that his lease might be cancelled unless he bought more of his TBA from Marathon. The Marathon representative testified that he verbally recommended to his district manager that Davis' lease be terminated. On March 16, 1970, the Marathon district manager in writing sought permission of higher management to cancel Davis' lease, relating that for six months the company had had operating and volume problems with Davis, that his station was dirty, that Davis was hard to counsel, that his gallonage was declining, and that Marathon sold him very little TBA. In March, 1970, Davis learned from a

Shell Oil Company representative that Marathon was considering cancellation of his lease. On June 15, 1970, Marathon notified Davis that his lease was being cancelled, effective August 31, 1970, and on August 31, 1970, Marathon took possession of College Marathon station.

9. Marathon introduced evidence of purchases by Davis and other Marathon dealers from two non-oil company replacement parts suppliers. No segregation of items purchased by the dealers could be established at trial in order to determine how much of such purchases was of TBA items offered by Marathon and how much was of merchandise Marathon did not carry in its line. Marathon also introduced testimony of five presently subsisting Marathon lessee-dealers, all of whom bought principally from Marathon those items of TBA Marathon offered in its line, purchasing non-competing items from other suppliers. None claimed to have been instructed to buy TBA only from Marathon. Cross examination developed that three dealers were former Marathon employees, one of these having owed Marathon up to thirty thousand dollars for TBA at one time and having made payments on the indebtedness of up to five thousand dollars per month to Marathon, and that another, hearing of Davis' lease cancellation, had doubled his TBA purchases from Marathon during the year 1970. Marathon offered testimony of its employees that Davis' station was dirty. Davis introduced evidence that he had a full-time janitor on the premises and, in rebuttal, offered testimony of an independent daily customer witness that the Davis station was an unusually clean one.

10. Davis introduced evidence showing that his marketing area had been substantially reduced by the opening nearby of a modern new Marathon station with resultant loss of gallonage to Davis. Also introduced was

testimony of Davis and an employee that no heavy repair work was done at College Marathon. In support of its contention that Davis was doing heavy repair work contrary to policy, Marathon elicited testimony of its sales representatives that Davis had "tied up" one bay of his station for one evening to work on the engine of his own truck.

REASONS FOR GRANTING THE WRIT

I. To review in the light of the United States Constitution, Amendment VII, the denial of a new trial to Petitioner after entry of judgment notwithstanding the verdict for insufficient evidence by the trial judge who as a sanction excluded relevant material evidence without a hearing to determine that sanctions were warranted.

Beacon Theaters v. Westover, 359 U.S. 500 (1959) unquestionably confirms the right to trial by jury in an antitrust case. However, the total effect of the proceedings in the District Court in this case as affirmed by the Court of Appeals, and especially in view of the Court of Appeal's denial to Petitioner of a new trial is to completely subvert the jury process by permitting a trial judge to summarily exclude relevant evidence and to draw conclusions of fact from selected conflicting proofs of the parties, ignore other relevant evidence and thereby substitute his judgment for that of the jury's in entering judgment notwithstanding the jury's verdict awarding damages to Petitioner.

On appeal from the District Court's judgment notwithstanding the jury's verdict for Petitioner, the Court of Appeals affirmed the judgment of the lower court, holding in part that Davis had failed to introduce evidence that could support the conclusion that it was a general

practice of Marathon imposed upon many or all of its lessee-dealers to purchase its TBA as a condition of receiving petroleum products or of retaining leases.

During trial, the District Court, as a sanction for Davis' presumed failure to make timely discovery, excluded the testimony of certain of Davis' witnesses recently discovered, whose testimony would have accomplished corroboration of Davis' claim of Marathon's imposition and enforcement upon its dealers of covert tying arrangements.

In holding that the trial court properly exercised its discretion in excluding the testimony of such witnesses, the Court of Appeals noted that, in January, 1973, Marathon served interrogatories upon Davis requesting the names of all persons acquainted with the facts of the case, and that on September 10, 1973, after the time provided in Rule 33(a), Federal Rules of Civil Procedure, Petitioner filed its answers. The Court further noted that on September 21, three days before trial was scheduled to begin, Petitioner filed supplemental answers listing the five new witnesses. The Court of Appeals ignored the likelihood that new evidence might be discovered requiring supplemental answers to interrogatories under the Rules. The Court of Appeals did not note, however, and Davis was never given a chance to explain to the District Court, for the trial record, that also in January, 1973, Davis served interrogatories on Marathon with answers received September 14, 1973, which answers consisted, principally, of objections to the relevancy and materiality of Davis' request for information respecting Marathon business statistics, dealer complaints, dealers' names, similar pending litigation, and other matters which Marathon did not deem to be concerned directly with Marathon's marketing operations in Findlay, Ohio to which it sought to limit trial. Davis did not, however, seek an order of compulsion against Marathon in view of the shortness of time, but to obtain the

evidence sought, proceeded to issue subpoenas *duces tecum* to get such evidence during trial. The Court of Appeals characterized Davis' proferred witnesses as "surprise" witnesses, and further observed there is no credible support for Davis' contention that he had just discovered these witnesses and that reasonable diligence would have disclosed the additional witnesses far in advance of the trial, stating erroneously that all such persons were either friends or employees of Davis' or were working in the Findlay area during the pendency of Davis' suit. There is no evidence in the record, or in fact, to support such a finding by the Court of Appeals and such misapprehension of that Court was the basis of Davis' petition for rehearing which the Court of Appeals denied by its order entered February 12, 1976. The Court of Appeals further characterized the filing by Davis of supplemental answers to interrogatories as unfair surprise contrary to the policy of the Federal Rules, again without supporting evidence. The Court of Appeals apparently assumed that the brief statement of trial counsel was a sufficient argument to set forth Davis' full defense to Marathon's motion.

Of course, there is no evidence in the record to support the observations and findings by the Court of Appeals, for the District Court permitted no explanation, save a brief attempt by counsel which was rejected out of hand or ignored. It is disclosed by the record that the trial judge presumed the bad faith of Davis, asserted that it would be unfair to Marathon to permit such witnesses to testify, doing so without consideration of or affording an opportunity to Petitioner to demonstrate Marathon's knowledge of the testimony of these witnesses or, indeed, even to permit counsel for Davis to thoroughly explain that the substance of all witnesses' testimony had been furnished to Marathon trial counsel in writing at the earliest possible moment. Davis had no opportunity to present evidence or argument

to the Court disclosing that as Davis then believed, the existence of the Marathon related witnesses had been concealed by Marathon's objections in lieu of answers to Davis' interrogatories. Davis was afforded no opportunity to present evidence to the Court that the two Marathon lessee-dealers and the two Marathon sales representatives were from the Columbus, Ohio area, that the two sales representatives were directly subordinate to Marathon's corporate representative at trial, the Marathon Columbus district manager, nor that the lessee-dealers operated service stations in the Marathon Columbus district and that one of the lessee-dealers was involved in litigation with Marathon in Columbus in a case involving similar issues. The trial court never learned that these four persons had never worked in Findlay, Ohio, in the Marathon Toledo district, and that all were strangers to Davis, or that the name of the single employee of Davis had been previously disclosed to Marathon in earlier discovery and was included in the supplemental answers *pro forma*.

In its order denying Davis' petition for rehearing, the Court of Appeals stated that Davis would have been expected to contact other Marathon lessee-dealers in the Findlay area, which area it apparently intended should include Columbus, Ohio, and beyond.

Petitioner submits that by requiring Davis to canvass other Marathon lessee-dealers over a wide area of more than one hundred miles radius and present their direct evidence at trial as suggested in its opinion denying Davis' petition for rehearing, the Court of Appeals has, in essence, required Davis to prepare and prosecute a class action, contrary to his wishes, contrary to the apparent wishes of many members of the prospective class, and, indeed, contrary to the prior holdings of this Court respecting the maintenance of private antitrust enforcement actions by single individuals. *Simpson v. Union Oil Company*, 377

U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964). It defies reality to expect that in view of the lesson presented to them by the apparently punitive cancellation of Davis' lease, that other lessee-dealers within Davis' immediate marketing area, and in the shadow of Marathon's home office would be willing to risk their business investments to testify upon a matter of principal.

In *Neely v. Eby Construction Co.*, 386 U.S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072 (1967), it was held that where a Court of Appeals sets aside a jury's verdict or affirms a judgment notwithstanding the verdict because the evidence was insufficient to send the case to the jury, it is not clear that the litigation should be terminated, for the erroneous exclusion of evidence at trial which would have strengthened Petitioner's case is an important possibility, and that another is that the trial court itself caused the insufficiency in Petitioner's case by erroneously placing too high a burden of proof on him at trial. The power of the Court of Appeals, under the rules, to order a new trial in such a case is therein confirmed.

Therefore, Petitioner urges that the Court of Appeals erred in failing to grant Davis a new trial in consequence of the District Court's abuse of discretion in the summary exclusion of the testimony of material witnesses without affording an adequate opportunity for Davis to demonstrate that the sanctions imposed were undeserved, inappropriate, unwarranted, excessively harsh and oppressive.

II. To resolve an apparent conflict between the holding of the Court of Appeals in this case and the prior holdings of this Court permitting proof by circumstantial evidence of the existence and enforcement of illegal tying arrangements in a private treble damage suit for violation of 15 U.S.C. §1 and 15 U.S.C. §14.

The decisions below are directly contrary to the applicable decisions of this Court and of the Courts of Appeals for the Fourth and Ninth Circuits, as to the nature of the proof required to establish the existence of and enforcement of a covert tying arrangement by an oil company in a lessee-dealer TBA antitrust case.

The Court of Appeals for the Sixth Circuit held in this case that Davis was required to prove the general practice of Marathon to require purchase of TBA as a condition of continued availability of petroleum products to or the continuation of the leases of many or all of its lessee-dealers, apparently by direct testimony of other dealers corroborating Davis' testimony as to the existence of the tie in. Furthermore, the Court of Appeals adopted the truncated version of the evidence from which the trial judge drew his conclusions of fact in granting judgment notwithstanding the verdict, both courts ignoring not only conflicts between Petitioner's and Respondent's testimony regarding threats, declining gallonage, housekeeping and the nature of repair work done by Davis, but also wholly avoiding the plain language of the documentary evidence tending to show domination by Marathon of the conduct of Davis' business and further establishing that one of the considerations for cancellation of his lease was the fact that Davis bought little TBA from Marathon.

Davis' proofs showed that during the years of 1969 and 1970, respectively, Marathon, nationally, operated 3,615 and 3,705 service stations, of which approximately

1,000 were operated in Ohio. National net sales of refined products in 1970 were of a value of $513,505,000.00. Marathon national TBA sales in the years 1969 and 1970, respectively, were $6,088,137.75 and $5,975,287.58, of which sales in the Ohio region for the years were $2,106,-986.40 and $2,142,965.33, respectively. Marathon ranked second or third among oil companies in volume of sales in Ohio in 1970. Davis' evidence showed that Marathon's TBA program was intended to provide a consistent image to the public of merchandise stocked and sold by Marathon lessee-dealers; that as early as the initial interview, Marathon lessees were informed that they were expected to participate in uniform advertising programs; that they were sold an initial stock of sponsored merchandise; that lessee-dealers operate their service stations on short-term year-to-year leases; and that Marathon kept track of Marathon sponsored TBA purchases by its dealers. Marathon's former Ohio region sales manager testified in Davis' case in chief that Marathon was entitled to net profits from TBA sales as "frosting on the cake" because of its investment in the land and buildings it leased to dealers.

The testimony of Marathon's former Ohio region sales manager, offered by Davis, also disclosed the manner of the operation of the Marathon TBA sales program, whereby Marathon representatives took dealer orders for delivery by B. F. Goodrich Company outlets, B. F. Goodrich thereafter billing Marathon for the purchases, and Marathon, in turn, billing the dealer for the merchandise delivered by Goodrich. The same procedure applied to dealers choosing Marathon's alternative Firestone Tire and Rubber Company TBA stocking program.

The difference to be perceived between this purchase-sales scheme and the sales commission agreement found to be inherently coercive in *Federal Trade Commission v. Texaco, Inc., et al.*, 393 U.S. 223, 21 L. Ed. 2d 394, 89 S. Ct.

429 (1968), is insignificant when it is considered that the lessee-dealer is just as certain under either scheme that the oil company holding dominant economic power over him is getting the TBA profits. Marathon supplied the customers to whom Goodrich or Firestone shipped the goods.

In *Federal Trade Commission v. Texaco, Inc., et al., supra*, it was held that the sales commission agreement existing between Texaco and Goodrich was inherently coercive and that it was therefore clear that the oil company's dominant economic power was used in a manner which tended to foreclose competition in marketing, even though there was no showing of direct overt practices by the oil company designed to force its dealers to buy sponsored products. In *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 837 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), it was held that the existence of other factors which might have contributed to the oil company's decision to cancel the lessee-dealer's lease will not affect the Petitioner's cause where the oil company's "illegal motive substantially contributed to the decision to cancel."

It is evident from the opinions below that the courts in this case have isolated the individual elements of Clayton Act and Sherman Act violations for purposes of testing the evidence on trial, rather than correctly viewing Petitioner's proofs upon trial as a whole, as taught by the opinion in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). In *Lessig*, it was held also that plaintiff need prove only a tacit tying arrangement by circumstantial evidence.

The standard of *per se* illegality of tying arrangements was summarized in *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958) as:

> They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to

the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. 356 U.S. at 6.

Petitioner submits that the evidence presented at trial meets all the foregoing tests for establishment of a covert tying arrangement and is sufficient to permit the inference of covert enforcement of such tying arrangements. It is further asserted that, upon questions of conflicting evidence as to the reasons for Marathon's cancellation of Davis' lease, the question was properly submitted to the jury and the jury having decided in favor of Davis, its verdict should not have been disturbed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

(Filed February 12, 1976)

No. 75-1037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARION DAVIS,
Plaintiff-Appellant,

vs.

MARATHON OIL COMPANY,
Defendant-Appellee.

ORDER

Before: CELEBREZZE, PECK, and MCCREE, *Circuit Judges.*

Upon consideration of the petition for rehearing, the court concludes that although petitioner is correct in his contention that proffered witness Poston was not a friend of Davis as stated in our opinion,[1] this error does not require a change in our decision. The resolution of this issue turned on Davis' failure to exercise due diligence in discovering witnesses before the eve of trial. At a minimum he would have been expected to contact other Marathon lessee-dealers in the Findlay area, which in our view is not as narrowly circumscribed for this purpose as Davis would restrict it.

Accordingly, the petition is DENIED.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

[1] The proffered testimony was that Poston was a friend of Dennis Smith, who was involved in a suit against Marathon similar to the one brought by Davis. His suit involved "Marathon Oil Company's gasoline allocation and business practices."

JUDGMENT ENTRY OF THE COURT OF APPEALS

(Filed December 12, 1975)

No. 75-1037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARION DAVIS,
Plaintiff-Appellant,

vs.

MARATHON OIL COMPANY,
Defendant-Appellee.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREFORE, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

OPINION OF THE COURT OF APPEALS

(Filed December 12, 1975)

No. 75-1037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARION DAVIS,
Plaintiff-Appellant,

v.

MARATHON OIL COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Before: CELEBREZZE, PECK and MCCREE, *Circuit Judges.*

MCCREE, Circuit Judge. This appeal from an order granting Marathon Oil Company's motion for judgment *n.o.v.* presents two questions for review: (1) whether the district court erred in holding that reasonable minds could not have found that Marathon Oil Company violated either section 1 of the Sherman Act,[1] 15 U.S.C. §1, or section 3 of the Clayton Act, 15 U.S.C. §14,[2] in cancelling appellant's

[1] Section 1 of the Sherman Act provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

[2] Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia

(Footnote continued on following page)

service station lease, and, (2) whether the district court erred in refusing to permit the testimony of five witnesses "discovered" by appellant only three days before trial despite Marathon's eight month old request for a list of all prospective witnesses. We hold that the district court did not err in entering judgment *n.o.v.*, and that it did not abuse its discretion in refusing to admit the testimony of five witnesses disclosed to Marathon only three days before trial.

Marion Davis, plaintiff-appellant, commenced this action on December 29, 1971, in the United States District Court for the Northern District of Ohio. The complaint charged that Marathon had violated sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act by, *inter alia*, "impos[ing] upon its hundreds of lessee-dealers exclusive dealing arrangements which require that the dealers secure their entire requirements of petroleum products and tires, batteries and other automobile accessories exclusively from the defendant . . . ."[8]

(Continued from previous page)

or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[8] The complaint continues:

These contracts and agreements are forced upon service station operators against their desires and are enforced by employees or agents of the said defendant, who constantly watch the products which are sold by the dealers. The service station operator knows that his lease will not be renewed at the end of the one-year-period, should he refuse to follow dictated prices or exclusive dealing arrangements of the defendant.

(Footnote continued on following page)

Nearly two years later, the case went to trial before a jury, and proofs were submitted from September 24 until October 4, 1973. On September 21, Davis attempted to amend the list of his prospective witnesses that had already been submitted to Marathon by adding five witnesses — two Marathon dealers, his former employee, and two Marathon employees. Marathon moved to preclude the testimony of these additional witnesses and, after argument, the court granted the motion. At the conclusion of appellant's case and again at the conclusion of all the proofs, Marathon moved for a directed verdict. The district court denied the motion. The case was thereupon submitted to the jury upon proper instructions, and it returned a verdict for Davis. Judgment on the verdict was entered on December 1, 1973.

Shortly thereafter, Marathon moved for a judgment *n.o.v.* or, in the alternative, for a new trial, and the district court entered an order granting the motion for judgment *n.o.v.*, dismissing the action, and assessing costs against Davis. In its memorandum opinion, the district court stated that "there was not a scintilla of evidence" to support the jury's verdict. It held, to the contrary, that the evidence demonstrated that Marathon did not require its service station lessees to purchase tires, batteries and ac-

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7. Marathon has informed its retail dealers, including the plaintiff, that they are required to buy the T. B. A. brand items handled by Marathon in preference to any other and that they must buy such T. B. A. items from Marathon exclusively. These requirements were not reduced to writing, but are commonly made orally by Marathon representatives who visit the dealers. The representatives inspect the dealers' stations for competing mechandise and merchandise purchased from distributors other than Marathon — often requiring that such be returned, if found and threaten non-renewal of an offending dealer's lease. The tying arrangements are imposed as a matter of general practice, and therefore affect a substantial volume of T. B. A. sold by Marathon dealers.

cessories (TBA) as a condition of receiving gasoline or of retaining their leases; that Davis purchased TBA from whomever he pleased; and that Davis' lease was terminated because he had been neglecting his service station to pursue other business interests with the consequence that the quality of services at the station deteriorated and it became unprofitable.

Appellant contends that the evidence was sufficient to permit reasonable persons to find that Marathon had impermissibly tied sales of gasoline to the lessee-operators of its service stations to sales of its TBA. Our examination of the record, however, demonstrates that although the complaint contained allegations of antitrust violations sufficient to withstand a motion to dismiss, appellant's evidence would not permit a reasonable person to find that these allegations had been proved.

"Tying arrangements" have been defined as "agreements under which the vendor will sell one product only if the purchaser agrees to buy another product as well." *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 60 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). An illegal tiein arrangement need not be expressed in a written contract, but the complainant must show that the seller would not make available to a purchaser one commodity unless the purchaser agrees to buy another. *Advance Business Systems & Supply, supra, Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 467-68 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

A tie-in arrangement may violate either section 3 of the Clayton Act or section 1 of the Sherman Act. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), *Advance Business Systems & Supply Co., supra.* The standards of illegality under the two statutes are similar. The Clayton Act makes it unlawful for a person en-

gaged in commerce to make a sale or contract for the sale of goods on the "condition, agreement, or understanding" that the "purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessee or seller, *where the effect* of such . . . sale, or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*" 15 U.S.C. §14. [Emphasis added.]

In *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (footnote omitted), the Supreme Court stated a similar standard under the Sherman Act:

> Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606. *They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. International Salt Co. v. United States*, 332 U.S. 392. Cf. *United States v. Paramount Pictures*, 334 U.S. 131, 156-159; *United States v. Griffith*, 334 U.S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.

In light of these standards, we consider whether there was sufficient evidence presented in this case to permit reasonable minds to conclude: (1) that Marathon violated the Sherman Act by having sufficient economic power to appreciably restrain free competition and imposing upon its lessee-operators a tying arrangement that restrained a not "insubstantial" volume of interstate commerce, or (2) that Marathon violated the Clayton Act by a tying agreement that tended to "substantially lessen competition" or "create a monopoly in any line of commerce."

THE PROOFS SUBMITTED AT TRIAL

For the five years before August 1966, Marion Davis was a lessee-operator of Pure Oil Company service stations in Findlay, Ohio. In addition to selling oil products, he operated a trailer and truck rental service and a vehicle washing service, performed motor tune-ups, brake repair, muffler and tailpipe replacements, and sold tires, batteries, and replacement automobile and truck parts.

In July 1966, Marathon Oil Company representatives asked Davis to assume operation of the College Marathon Service Station in Findlay. As a condition of becoming a Marathon lessee, Davis was required to purchase the station inventory that had been ordered but not sold by his predecessor. Davis cancelled his lease with Pure Oil and assumed operation of the Marathon station on August 22, 1966. The Marathon lease, signed four days later, was a standard year-to-year contract containing the usual 30 day termination provision that either lessor or lessee could exercise. It was renewed annually in 1967, 1968, and 1969 until Marathon exercised its right to cancel in 1970.

From 1966 to 1970, Marathon marketed its petroleum products and its sponsored TBA brands primarily in Wisconsin, Michigan, Illinois, Ohio, Kentucky and Florida.

The Marathon "Ohio Region" included the entire state of Ohio, a portion of Kentucky, and a part of interstate highway "I-75," from Ohio through Florida. Marathon had over one thousand stations in Ohio, where it ranked either second or third in sales of branded gasoline. Approximately ninety percent of Marathon service stations were owner-operated.

During the four year period in question, Marathon sold to its dealers at wholesale prices certain brands of tires, batteries and accessories (TBA). It sold both "B. F. Goodrich" and "Firestone" tires, sponsored "Delco" batteries, and made available to its dealers accessories normally stocked by service stations including "Fram" air and oil filters, "Anco" windshield wiper blades, "Champion" spark plugs, "B. F. Goodrich" fan belts, radiator hoses, shock absorbers, sealed beam headlamps and automobile light bulbs.

Marathon encouraged its TBA sales by offering its dealers special promotions, discounts and other incentives, including a bonus rebate from seven to ten percent of his total annual TBA purchases.

Marathon did not provide its dealers with replacement parts not ordinarily stocked by service stations including, for example, mufflers, tail pipes, water pumps, generators, alternators, regulators, gaskets, wheel bearings, hydraulic parts, brake shoes and ignition parts. When necessary, a dealer ordered these parts from automotive suppliers whose primary business was not the sale and distribution of petroleum products.

During the period in question, there were three major automotive equipment suppliers in the Findlay area: Sparton Distributing Company, Inc., The Ohio Automotive Supply Company, and Steele's Automotive, Inc. The record does not show that Davis made any purchases from Steele's either while he was a Pure Oil dealer or while he

was a Marathon dealer. It does show, however, that although he purchased almost nothing from Sparton when he was a Pure Oil dealer, he made substantial purchases from Sparton after he became a Marathon dealer. For example, from January through July 1966, Davis purchased $12.15 worth of goods from Sparton. From August until December 1966, while Davis was operating the College Marathon station, he purchased $1,640.79 worth of goods from Sparton. His annual battery and accessory purchases from Sparton totaled $2,447.53 in 1967, $3,439.32 in 1968, $2,733.03 in 1969, and $5,321.30 in the first eight months of 1970. Davis' battery and accessory purchases from Marathon totaled $2,897 in 1967, $3,416 in 1968, $3,707 in 1969, and $1,662 in the first eight months of 1970. In addition, each year during which he operated the College Marathon station, his purchases from Marathon were approximately $1,000 less than his purchases from Ohio Automotive Supply.

There was no significant difference between Davis' acquisition and sale of Marathon TBA and his acquisition and sale of Ohio Distributing and Sparton TBA. Sales representatives from Sparton, Ohio Distributing, and Marathon visited his station each week to check inventories, to determine his needs, and to prepare orders for goods. Sometimes Davis did not even sign the orders because he relied on the sales representatives to determine his needs. He displayed the supplies purchased from Sparton and Ohio Distributing in the same manner as the supplies purchased through Marathon. In describing how he ordered his TBA, Davis testified that he purchased TBA from whomever he wanted.

The evidence also disclosed that the other nine Marathon station lessees in Findlay purchased batteries and accessories from both Ohio Automotive and Marathon. Five of them purchased a greater dollar amount of these

items from Ohio Distributing than they did from Marathon. Moreover, five dealers also testified that although they bought their TBA primarily from Marathon when available, they had never been required by Marathon to purchase these items exclusively from it.

In order to show that Marathon imposed upon its hundreds of service station lessees an illegal arrangement tying the sale of its sponsored TBA items to the sale of its petroleum products, Davis relied primarily upon four incidents.

The first incident occurred approximately two months after Davis took over the Marathon station. On October 11, 1966, appellant ordered 15 "Delco" batteries from Sparton. He testified that he returned the batteries three days later because James Day, the Marathon sales representative, had instructed him to do so. Then, pursuant to the Marathon representative's order, on October 17, B. F. Goodrich Company shipped and billed to appellant 15 identical "Delco" batteries, charging an average of two dollars less per battery than Sparton's price. Whatever the significance of this event, the record discloses also that Davis made four additional purchases of "Delco" batteries from Sparton during the same month.

The second incident occurred four years later in February 1970. Day's successor as the Marathon representative, Gary Burocker, ordered some TBA, including a quantity of obsolete air filters for appellant without obtaining his signature. When appellant returned them, Burocker visited the station the same day to inquire about them, and told appellant that he should have accepted the order. It does not appear that anything further occurred in connection with this incident.

The third and fourth incidents relied upon by appellant to show an illegal tying arrangement occurred in 1970, when appellant purchased shock absorbers and tires from

Sparton and Buckeye Distributing Co. Burocker told him about that time that his lease might be cancelled unless he purchased more TBA from Marathon.

After October 1966, Davis testified that he made no large purchases from other suppliers of items offered for sale by Marathon until March 1970 when he purchased $752 worth of shock absorbers from Sparton and twelve tires from Buckeye Distributing Company.

During the same month, March 1970, that Davis made the purchases from Buckeye and Sparton, the Marathon district manager sought permission from his superiors to cancel Davis' lease for the stated reasons that for six months he had operating and volume problems, that his station was dirty, that he was unwilling to accept advice from Marathon representatives, that his sales of gasoline were declining and that his sales of Marathon-sponsored TBA were insufficient. When Davis learned of the proposed cancellation from a Shell Oil Company representative, he contacted an attorney. The attorney advised Marathon of Davis' inclination to bring an antitrust suit against it charging that it had tied its sales of gasoline or the leasing of its stations to sales of its TBA. Shortly thereafter, the Marathon district manager wrote two memoranda to his superiors, one outlining the procedure to be followed in cancelling Davis' lease in accordance with the terms of the lease agreement, and the second listing the brands of TBA stocked by Davis and the names of the suppliers.

On June 15, 1970, Marathon notified Davis that his lease would be cancelled on August 31, 1970, and on that date, Marathon took possession of the station.

This evidence, even when construed most favorably to Davis, does not permit a finding that Marathon tied its sales of petroleum products to appellant to his purchases of its TBA, or that continuation of his lease was conditioned upon the purchase of TBA exclusively from Marathon. There is no evidence in the record that Marathon refused at any time during the four year period to supply Davis' requirements of petroleum products. And there is insufficient evidence to permit a determination that Davis' lease was cancelled because he refused to purchase Marathon-sponsored TBA in preference to the TBA sold by other suppliers.

Of the four incidents relied upon by appellant to show Marathon's liability the first two offer no support for his position. The 1966 incident concerning the "Delco" batteries shows only that the Marathon sales representative convinced appellant to return 15 batteries which were then reordered from Marathon at a savings of $2 per battery. The 1970 incident concerned the unordered air filters. However, after Burocker's initial pique when appellant returned the unordered and obsolete TBA, nothing more appears to have come from the incident.

The last two incidents concerned Burocker's complaint in 1970 about the low volume of appellant's TBA sales and Burocker's intimation that this could result in the loss of the lease. This evidence is as consistent with Marathon's claim that appellant was neglecting the station and losing business as it is with appellant's allegations about a tying arrangement. Significantly, no express threats to cancel the lease were made by the salesmen and there was no communication from any other Marathon employee or officer.

But more importantly, as the trial judge emphasized:

> Although plaintiff testified that in 1969 he started buying more TBA from others, and this led to the cancellation of his lease, the documentary evidence showed that in fact plaintiff had increased his TBA purchases from defendant in 1969.
>
> The defendant's evidence showed that in the last year of his lease, plaintiff was devoting much of his

time to other business interests which he had; that gasoline sales at the station had fallen off markedly; that the housekeeping at the station was very poor; and that the plaintiff was tying up the service bays at the station by doing heavy repair work of the type which is not appropriate for a full-service gasoline station. Plaintiff was warned about these findings, but seeks to excuse or minimize them, and to convert the warnings into threats that would be in violation of the antitrust laws.

However, even if Davis had shown that Marathon had required him to purchase Marathon TBA in order to retain his lease and to purchase Marathon petroleum products, there is no evidence in the record that could support the conclusion that it was a general practice of Marathon, imposed upon many or all of its lessee-operators, to purchase its TBA as a condition of receiving petroleum products or of retaining leases. The only evidence about the experiences of other lessee-operators of Marathon was the testimony of five Marathon dealers who said that they had never been threatened with the loss of their leases if they did not purchase Marathon-sponsored TBA exclusively. The most that can be said for appellant's proofs is that they show that Day and Burocker were aggressive salesmen who were interested in increasing their sales of Marathon TBA.

We hold that Davis clearly failed to present sufficient evidence to permit a determination that the "total volume of sales tied by the sales policy under challenge" was not "insubstantial." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). Likewise there was no evidence permitting a determination that Marathon's actions tended to "create a monopoly" or "substantially lessen competition." Accordingly, there was no evidence that required submission to the jury, and the district court did not err in granting the motion for judgment *n.o.v.* *See*

e.g., Atlantic Refining Co. v. F.T.C., 381 U.S. 357 (1965), *Lessig v. Tidewater Oil Co., supra.*[4]

[4] Compare the evidence of a Clayton Act and a Sherman Act violation adduced in *Lessig* v. *Tidewater Oil Co., supra, at* 467-68:

> Lessig offered evidence of the following circumstances in support of his allegation that Tidewater imposed upon its dealers a system of exclusive dealing and tying arrangements applicable to petroleum products, and to tires, batteries, and automotive accessories (TBA) which Tidewater sold or sponsored.[16]
>
> Tidewater's service station leases were renewable annually, and were subject to cancellation at six-month intervals on thirty days' notice. Each dealer contract ended automatically upon termination of that dealer's lease. The dealer was required by his contract to purchase from Tidewater "his total requirements of gasoline, motor oils and greases, regularly manufactured and sold by" Tidewater, to an amount specified in the contract; and the amount specified in each dealer contract was the estimated full requirements of that dealer's station. When the service station lease and dealer contract were executed Tidewater's representatives told the dealer that he was to purchase from Tidewater his requirements of petroleum products and of those TBA items which it sponsored or sold. Tidewater's representatives accompanied salesmen of sponsored merchandise while the latter secured orders from dealers. Tidewater's representatives inspected dealers' stations for competing merchandise, required that it be returned, and threatened nonrenewal of the offending dealer's lease. Credit card sales of nonsponsored merchandise were charged back to the dealer if the customer failed to pay. New dealers were required to purchase from outgoing dealers only inventory purchased from Tidewater.
>
> The record disclosed the disproportionate size and economic strength of the parties.[17] There was evidence that Tidewater imposed exclusive dealing and tying arrangements against the dealers' wishes to provide Tidewater with noncompetitive access to the portion of the market which the dealers' stations represented. Dealers testified that they feared to buy competing brands of oil and sponsored TBA items even when requested by customers and even though the cost to dealers was less, and that when they purchased competing merchandise they hid it.
>
> Evidence was offered that Tidewater entered into leases and dealer contracts, containing provisions similar to those described, with about 2,700 service station operators in eight western states. Some of the practices described admittedly were followed with respect to all Tidewater dealers, and the

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Finally, we consider whether the district court abused its discretion in refusing to permit the "eleventh hour" witnesses to testify because their names had been furnished in supplemental answers to interrogatories only three days before trial was scheduled to begin. A trial court has broad discretion in its choice of sanctions for failure to comply with discovery orders and, in appropriate circumstances, it may even dismiss the case. We hold that the trial court properly exercised its discretion here.

In January 1973, Marathon served interrogatories on appellant requesting the names of all persons acquainted with the facts of this case. On September 10, 1973, well after the time period provided in Rule 33(a) F.R. Civ. P., appellant filed an answer to these interrogatories. Then, on Friday, September 21, only three days before the trial was scheduled to begin on Monday, September 24, appel-

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others appeared to be of quite general application. Thus, the jury could conclude that the restrictive provisions and practices affected a substantial portion of Tidewater's sales to its dealers of about 310 million gallons of gasoline annually (about five per cent of the gasoline sold through dealers in the area), and four to five million dollars worth of TBA.

From this evidence the jury could conclude that Tidewater sold petroleum products and sponsored TBA to its dealers upon conditions and understandings — express and tacit, oral and written — that they not deal in commodities sold by competitors of Tidewater. The only serious question is whether the jury could also conclude that these conditions and understandings might lessen competition substantially or tend to create a monopoly in a line of commerce, as required by the Clayton Act.

[16] Tidewater produced the gasoline and other petroleum products which it sold to dealers for resale. It purchased tires and batteries and resold them to dealers. It also distributed selected automotive accessories under agreements with manufacturers providing that Tidewater was to have a stipulated discount or rebate on sales to dealers.

[17] Tidewater is one of the country's major oil companies. It does business in 32 states, and its assets exceed $800 million. It sold about 6.5% of the total gasoline sold in the eight western states.

lant filed supplemental answers listing five new witnesses, one of whom was his former employee.

The district court, in precluding the calling of the witnesses, observed that Davis' case had been pending for nearly two years, and expressed its concern that the primary purpose of the liberalized civil discovery rules, the prevention of surprise to one's opponent, would be undermined if these witnesses were permitted to testify.

We also observe that there was no credible support for Davis' contention that he had just "discovered" these witnesses. Reasonable diligence would have disclosed the additional witnesses far in advance of trial. One was a former employee, two were Marathon lessees, one of whom was a friend of Davis, and the other two were Marathon employees working in the Findlay area during the pendency of Davis' suit. No reason is offered and none appears why they could not have been found sooner than three days before trial.[5]

[5] A proffer was made that the precluded witnesses would have testified to the following effect:

The proffered testimony of Charles Trautwein, an employee of Davis at the College Marathon station in 1969 and 1970, would have shown only that Trautwein believed that Marathon operated a poor TBA service, that he encouraged Davis to buy TBA from other suppliers, that the Marathon sales representative was an aggressive salesman, and that Davis continued to purchase certain items of TBA from Marathon. Dennis Smith, a Marathon lessee in Ohio since 1969, was expected to testify that although he purchased the inventory already at his station when he leased it, he had not purchased any Marathon TBA for four years despite pressure from Marathon sales representatives and that he was told by one of them *a month before trial* that he "would be participating in the Marathon TBA program by the end of the year." Smith was also expected to testify that he was told that he would not receive a Marathon lease for a second station because Marathon had decided to award it to a person who participated in its TBA program and that he furtively searched the briefcase of a Marathon sales representative and discovered a document entitled "Goals and Objectives" that apparently suggested that unless a certain lessee purchased Marathon TBA, a new dealer would be found. Finally, Robert Poston, another

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In the short time afforded, there was virtually no way for Marathon to prepare adequately to respond to the testimony of the surprise witnesses. Unfair surprise of this sort is contrary to the policy of the federal rules, which sanction extensive discovery. If appellant had refused to answer the interrogatory in question, Marathon could have obtained an order requiring appellant to answer under Rule 37(a). Then, if appellant still refused to answer, or answered incompletely, Rule 37(b) provides that the court could issue "[a]n order . . . prohibiting . . . [the disobedient party] from introducing designated matters in evidence . . . ." Since Marathon did not know that the original answer was incomplete, it did not move for an order under Rule 37(b) to compel appellant to complete it. Even though Rule 37(b) is not directly applicable, we hold that the trial judge properly exercised discretion in regard to the surprise witnesses, and that any other decision would be contrary to the policy of Rule 37. In a similar situation, the district court for the Southern District of New York refused to permit the testimony of two witnesses. *Newsum v. Pennsylvania Ry. Co.*, 97 F. Supp. 500 (S.D.N.Y. 1951).

For the foregoing reasons, the judgment of the district court will be affirmed.

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Marathon lessee, was expected to testify that he purchased nearly all of his TBA requirements from Marathon because he believed it was expected of him and that a Marathon sales representative told him that if a dealer did not buy TBA from Marathon, they would find a new dealer, and that dealers who did not buy Marathon TBA would not receive gasoline, while dealers who did would receive "extras" from the company including extra gasoline.

JUDGMENT OF THE DISTRICT COURT

(Filed September 18, 1974)

Civil No. C 71-388

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

JUDGMENT

This action came on for trial before the Court, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that motion of the defendant for judgment notwithstanding the verdict should be and hereby is granted, and it is

Ordered and Adjudged that judgment in this case filed December 11, 1973 is hereby vacated, and it is

Ordered and Adjudged that judgment notwithstanding the verdict of the jury should be and hereby is entered in favor of the defendant Marathon Oil Company against plaintiff Marion Davis, and it is

Ordered and Adjudged that the action should be and hereby is dismissed at plaintiffs cost.

Dated at Toledo, Ohio, this 17th day of September, 1974.

MARK SCHLACHET
Clerk of Court

/s/ BEATRICE L. REIHING
Deputy Clerk

APPROVED:

/s/ DON J. YOUNG
United States District Judge

ORDER OF THE DISTRICT COURT

(Filed September 17, 1974)

Civil No. C 71-388

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

This cause came to be heard upon motion of the defendant for judgment notwithstanding the verdict or for a new trial. For the reasons stated in the accompanying opinion and for good cause appearing, it is

ORDERED that the motion of the defendant for judgment notwithstanding the verdict should be and hereby is granted, and it is

FURTHER ORDERED that the judgment in this case filed December 11, 1973 should be and hereby is vacated, and it is

FURTHER ORDERED that judgment notwithstanding the verdict of the jury should be and hereby is entered in favor of the defendant Marathon Oil Company against plaintiff Marion Davis, and it is

FURTHER ORDERED that the action should be and hereby is dismissed.

IT IS SO ORDERED.

DON J. YOUNG
United States District Judge

TOLEDO, OHIO

OPINION OF THE DISTRICT COURT

(Filed September 17, 1974)

Civil No. C 71-388

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

OPINION

YOUNG, *J*:

This action was originally commenced on December 29, 1971, by Marion Davis, hereinafter referred to as plaintiff, and the Spartan Distributing Company against the Marathon Oil Company, hereinafter referred to as the defendant, alleging violations of the Clayton Act and the Sherman Act.

The case was tried to a jury, commencing on September 24, 1973. The trial concluded on October 4, 1973. At the close of the plaintiffs' case, the Court rendered judgment in favor of the defendant against the Spartan Distributing Company. The jury returned a verdict in favor of the plaintiff. Defendant has filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, which has been fully argued by briefs.

Plaintiff had for a number of years operated gasoline filling stations in Findlay, Ohio. On August 22, 1966, he

leased from the defendant a gasoline service station on the corner of North Main and Frazer Streets in Findlay, Ohio. The lease, as was standard in the gasoline station business, was for the term of one year, with automatic renewals for a like period unless either of the parties gave notice of termination not less than thirty days prior to the expiration of any term.

The defendant gave timely notice of termination to the plaintiff, and the lease was terminated on August 22, 1970. Ten days after receiving notice of termination of the lease, plaintiff entered into a similar one year lease with another oil company. Prior to entering into the lease with defendant, plaintiff had himself given notice of termination of leases he had entered into with other oil companies. All of the leases plaintiff ever had with any company had a thirty-day termination notice provision. Plaintiff regarded this as being favorable to him as well as to the lessors, and took advantage of it when it seemed advantageous to him.

Plaintiff's contention is that the defendant terminated its lease because he bought tires, batteries and accessories (hereinafter referred to as TBA) from suppliers other than the defendant, and that the defendant violated the Clayton and Sherman Acts by requiring all its lessees, as a condition of being supplied with gasoline and oil, to buy all their requirements of TBA from the defendant.

Practically the only evidence which really appeared to support this contention related to an episode which occurred in October of 1966, shortly after plaintiff first leased from defendant. On that occasion plaintiff had purchased fifteen batteries from a wholesaler. Shortly thereafter the defendant's sales representative came to the station and saw the batteries, and complained that plaintiff had not purchased them from the defendant. Plaintiff thereupon returned the batteries, and got the same batteries from

the defendant. It is noteworthy that the defendant's price was two dollars per battery lower than the price charged by the other supplier. There were three other episodes involving difficulties over TBA purchases, but they added nothing to support the plaintiff's contentions. There is considerable question whether this episode, which may be as consistently explained by a misunderstanding by a new lessee of the advantages of buying from his lessor as by a violation of the anti-trust laws, is admissible at all in evidence or as a basis for relief, since it occurred more than four years prior to the commencement of this action, and thus was beyond the statute of limitations. However, it seems unimportant to resolve this problem, and the Court does not decide it.

Although the plaintiff contended that he was constantly threatened with the loss of his lease if he did not purchase all his TBA from the defendant, the evidence leaves no doubt whatever that the plaintiff continued to purchase TBA from whomever he pleased, and the defendant's salesmen were entirely aware of this. All salesmen, defendant's and others, followed the practice of coming to the plaintiff's station, checking his stock, writing up orders, and sending him the TBA they thought he needed. On one occasion plaintiff was irritated because defendant sent him a quantity of goods which included some obsolete oil filters. In a fit of pique, plaintiff returned the whole order, but no issue was made of it by anyone. Again, the testimony which tended to show complaints by defendant's salesmen about the volume of TBA purchases is as consistent with the picture of plaintiff as a poor and unprofitable lessee as it is with attempts to violate the anti-trust laws. The burden is on the plaintiff to overcome this ambivalence in the evidence.

Although plaintiff testified that in 1969 he started buying more TBA from others, and this led to the cancel-

lation of his lease, the documentary evidence showed that in fact plaintiff had increased his TBA purchases from defendant in 1969.

The defendant's evidence showed that in the last year of his lease, plaintiff was devoting much of his time to other business interests which he had; that gasoline sales at the station had fallen off markedly; that the housekeeping at the station was very poor; and that the plaintiff was tying up the service bays at the station by doing heavy repair work of the type which is not appropriate for a full-service gasoline station. Plaintiff was warned about these findings, but seeks to excuse or minimize them, and to convert the warnings into threats that would be in violation of the anti-trust laws.

The defendant also offered evidence that its TBA business, while extensive and somewhat profitable, was conducted primarily for the benefit of the lessees of its stations, who could get their merchandise at very favorable prices if they bought in volume; and secondarily to maintain its image with its customers, who could get the products and service they were used to anywhere that the defendant operated, not just in their own communities.

A number of other lessees of defendant testified that they were not aware of any requirement to buy TBA from the defendant, and that they did in fact buy TBA when and from whom they pleased, and could do so most profitably.

In his arguments opposing defendant's motion, plaintiff contends that the testimony of these lessees is not entitled to any probative force because of their continuing relationships with the defendant. This contention overlooks the fact that in order to succeed in his suit, the burden is upon plaintiff to show that his experience was not unique, but that the defendant, as alleged in the complaint:

> [I]mposes upon its hundreds of lessee-dealers exclusive dealing arrangements which require that the dealers secure their entire requirements of petroleum products and tires, batteries and other automotive accessories exclusively from the defendant . . . . These contracts and agreements are forced upon service station operators against their desires and are enforced by employees or agents of the said defendant, who constantly watch the products which are sold by the dealers. The service station operator knows that his lease will not be renewed at the end of the one year period, should he refuse to follow dictated prices or exclusive dealing arrangements of the defendant.

If the testimony of the other station operators is totally discarded, the plaintiff has still failed in his proof of these essential allegations of his complaint. Plaintiff ingeniously argues that if an interested witness testifies one way, the finder of the facts has a right to conclude that the truth is just the opposite, even though there is no other probative evidence to this effect. No authority is cited for so novel a proposition. Standard jury instructions give the jury the option of rejecting entirely testimony which they find is biased or untruthful. But they are not permitted to guess or speculate as to what the truth is, IF THERE IS NO PROBATIVE EVIDENCE AFTER THE SUSPECT TESTIMONY IS REJECTED.

Not only can plaintiff gain no support from the testimony of the other local dealers, but he called as his own witness Gary Burocker, the defendant's sales representative, who testified that he recommended termination of the lease for lack of gasoline sales, improper housekeeping, heavy repair work done in the service bays, and failure to use advertising displays, and that the termination had no relationship to plaintiff's TBA purchases. He testified as follows:

> "Q. You were fully conscious of the fact that he did buy from independent suppliers, were you not?

> "A. Yes, I was.
>
> "Q. You had no objection to that?
>
> "A. No, I did not.
>
> "Q. You did not expect him to buy all his TBA that was available from Marathon, did you?
>
> "A. No, I did not."

Thus, a careful analysis of the evidence, taken as a whole, shows that the plaintiff's picture of himself as a small businessman crushed by a giant corporation is inaccurate. The evidence totally fails to support the wildly exaggerated allegations of the complaint. Actually, the evidence shows plaintiff neglecting the service station to pursue other interests until the business had deteriorated and become unprofitable to both parties to the lease. He was not driven from the service station business by the termination of the lease, for he signed a lease with another oil company ten days after he received the notice of termination from the defendant. His action thus appears to be more of an attempt to get money out of the defendant by a nuisance lawsuit than a legitimate anti-trust case.

Plaintiff relies principally upon the case of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). Factually, however, *Lessig* is entirely distinguishable from the present case. Specifically, it deals with the fixing of gasoline prices, which is in no way involved in the present case. The real distinction however, is found in the court's statement on page 467.

> Dealers testified that they feared to buy competing brands of oil and sponsored TBA items even when requested by customers and even though the cost to dealers was less, and that when they purchased competing merchandise they hid it.

As previously pointed out, the only other dealers who testified in this case gave testimony exactly contrary

to this, and even in the October, 1966 episode, upon which plaintiff now lays much stress, the price of the defendant's batteries was substantially less than that of the rival batteries, again the exact opposite of the situation in *Lessig*.

Plaintiff also relies upon *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961). In that case again, the facts bear no resemblance to those actually shown in the present case. There Sinclair had an agreement with Goodyear to sell Goodyear's TBA and other products exclusively in its service stations, for which Goodyear paid Sinclair a substantial commission. The evidence established that all of Sinclair's dealers were ordered to sell Goodyear TBA on penalty of losing their leases. Here there is no evidence from any other dealers than the plaintiff. Another major distinction appears in the court's language on page 834 of the opinion,

> It is considered, however, that there were competing brands, and there is no suggestion that Goodyear was superior to other brands of TBA or that there was any benefit to the dealers handling Goodyear rather than one of the other lines.

On the contrary, in the present case the evidence showed conclusively that those dealers who sold larger volumes of the defendant's TBA were given, in addition to very favorable prices, special and increasing refund discounts. The plaintiff's witness Whitman's testimony also established that rather than getting a kick-back from its suppliers of TBA, defendant was trying to create favorable customer relations by its TBA program. This would of course further advance the dealers' interests as well as its own. It seems rather implicit from the facts of *Osborn* that in the background was the old commercial struggle between Goodyear and Firestone, for Osborn himself was a Fire-

stone dealer, in addition to leasing Sinclair's service station.

Plaintiff also relies on *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). There again the real problem was gasoline price fixing, a matter not involved in the present case. In this plaintiff relies primarily on the Supreme Court's statement that "it matters not that the complainant may be only one merchant." However, even though there was only one complainant, the illegality involved "a vast gasoline distribution system, fixing prices through many retail outlets." In the present case, there was not a scintilla of evidence involving any dealer but the plaintiff in anything, much less gasoline price fixing. This distinction is clearly made in *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967), although that case again concerned only gasoline prices.

In the case of *Timken Roller Bearing Co. v. F.T.C.*, 299 F.2d 839 (6th Cir.) *cert. denied*, 371 U.S. 861 (1962), the court holds that the showing of a single jobber that his contract was cancelled by Timken for dealing in competitive bearings, even if true, would not constitute substantial evidence of a consistent policy of exclusive dealing. In the case of *South End Oil Company v. Texaco, Inc.*, 237 F. Supp. 650 (N.D. Ill. 1965), the court says,

> We are not aware of any case in which a finding of 'unlawful conduct' rests on the isolated experiences of one businessman.

In a case very similar upon its facts to the present one, the District Court refused to enjoin the defendant from terminating plaintiff's service station lease, saying,

> Moreover, the record indicates that the defendant chose not to renew the plaintiff's lease for reasons other than plaintiff's refusal to buy T.B.A. products, such as declining gasoline sales and failing to keep

the gas station clean. *Hollander v. American Oil Co.*, 329 F. Supp. 1300, 1302 (W.D. Pa. 1971).

This case is an example of an increasingly frequent and highly disturbing practice of trying to bring simple tort or contract cases of little or no merit into the federal courts by pleading an antitrust or civil liberties claim. It is easy to distort the true facts into pleadings which are facially valid, just as the plaintiff did here, and thus compel the court to bring the matter to a trial which is often very time consuming. In the present case eight court days were required for trial.

In what in retrospect appears to have been an overabundance of caution, this Court overruled the defendant's motions for a directed verdict at the close of plaintiff's case, and at the close of all the evidence. The jury, apparently more swayed by the emotional appeal of a poor little filling station operator allegedly oppressed by a giant corporation, disregarded the law given to it in the Court's instructions, and reached an unjustified and untenable verdict. It cannot be allowed to stand. Viewed in the cold light of reason, reasonable minds could not find from the evidence in this case that the defendant made a lease or a contract for the sale of goods on the understanding that the plaintiff not deal in goods of a competitor, and that the effect of the agreement was substantially to lessen competition or to tend to create a monopoly, the essential elements of a violation of the Clayton Act. Nor could reasonable minds find from the evidence in this case the existence of a contract, combination, or conspiracy, sufficient economic power with respect to the tying product (gasoline) to impose an appreciable restraint on free competition in the tied product (TBA), and a substantial volume of interstate commerce in the tied product, the essential elements of a violation of the Sherman Act.

The motion filed by defendant for judgment notwithstanding the verdict will therefore be granted, and an order will be entered expressing of this ruling.

/s/ Don J. Young
United States District Judge

JUDGMENT OF THE DISTRICT COURT

(Filed December 11, 1973)

Civil No. C 71-388

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that pursuant to 15 U.S.C. Sec. 15 the Court is required to treble $15,000 verdict returned by the jury which results in a judgment of $45,000 in favor of the plaintiff and it is

FURTHER ORDERED and ADJUDGED that for the reasons stated in the Court's accompanying memorandum the costs, including a reasonable attorney's fee, will be assessed at $17,841.42.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this court on December 11, 1973.

Dated at Toledo, Ohio, this 11th day of December, 1973.

APPROVED:

/s/ DON J. YOUNG
U. S. District Judge

/s/ DOMINIC J. CIMINO
Clerk of Court

MEMORANDUM OF THE DISTRICT COURT

(Filed October 25, 1972)

Civil No. C 71-388

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

MEMORANDUM

YOUNG, *J:*

This is an action for an alleged antitrust violation under the Sherman and Clayton Acts. The sole question now before this Court is whether plaintiffs' demand for a jury trial should be sustained.

The syllogism which supports defendant's position is a nice piece of tight reasoning. It is said that one has a right to a trial by jury only when the action is one which existed at common law, thus coming within the provision of the Seventh Amendment, or when a statute specifically provides for a trial by jury. There can be little dispute that the present action did not exist at common law. Nor does it appear that Congress has specifically provided for the right to trial by jury in the Acts. The conclusion would, therefore, seem to be clear that there is no right to a jury trial in an antitrust case.

In spite of this compelling logic, however, there is a plethora of cases which specifically hold that a jury trial is required in an antitrust case. See *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), and the line of cases stemming from this decision.

In view of this overwhelming body of law which has consistently held that there is a right to a jury trial, this Court concludes, with considerable reluctance, that in this case, plaintiff should be afforded a trial by jury. This Court is troubled because a critical examination of the decisions of the Supreme Court shows clearly that what was a bit of dictum thrown into that Court's reasoning in *Fleitmann v. Welsback Street Lighting Company of America,* 240 U.S. 27, 28, 29 (1916), is accepted very offhandedly as expressing the law in *Beacon Theatres, Inc. v. Westover, U.S. District Judge, supra,* until finally the lower courts accept it as unquestioned law, *Lah v. Shell Oil Company,* 50 F.R.D. 198, 199 (S.D. Ohio 1970). Because of the sheer weight of authority, this Court feels constrained to follow a rule which is sound neither in logic nor in law.

Admittedly, in this particular case, no particular practical difficulties will be presented in trying the case to a jury. What would happen if this case presented the complexities usually found in antitrust litigation is another question. This Court has the greatest respect and admiration for the institution of trial by jury, and understands the zeal of appellate courts which are emotionally involved with the question of the liberties of the subject to extend the right. But as Mr. Justice Holmes, whose dictum in *Fleitmann* is responsible for the present problem, said in another connection, "Not logic, but experience, is the lifeblood of the law." Logic and experience do not always conflict, and trial court judges, who are far more

intimately experienced with jury trials than are their superiors on the appellate benches, recognize that there are a great many areas in which a jury is by no means superior to an experienced judge as a fact finder. In general, antitrust actions would seem to fall into this category. However, as previously stated, this Court feels required to follow the majority of opinion, in spite of its personal conviction that the opinion is wrong, and will grant the demand of the plaintiffs for a jury trial. An order will be entered accordingly.

/s/ DON J. YOUNG

United States District Judge

Toledo, Ohio.

ORDER OF THE DISTRICT COURT

(Filed October 25, 1972)

Civil No. C 71-388

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARION DAVIS, *et al.*,
Plaintiffs,

vs.

MARATHON OIL COMPANY,
Defendant.

ORDER

This cause came to be heard upon the question of whether plaintiffs' demand for a trial by jury should be sustained. The defendant filed opposition to plaintiffs' motion. For the reasons stated in the accompanying memorandum, good cause therefor appearing, it is

ORDERED that the demand of plaintiffs for trial by jury should be and hereby is sustained.

/s/ DON J. YOUNG

United States District Judge

Toledo, Ohio.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers,

or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. §14

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.